IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

LORETTA STARVUS STACK, AL RICHMOND, PHILIP MARSHALL CONNELLY, DOROTHY ROSENBLUM HEALEY, ERNEST OTTO FOX, WILLIAM SCHNEIDERMAN, CARL RUDE LAMBERT, HENRY STEINBERG, OLETA O'CONNOR YATES, ROSE CHERNIN KUSNITZ, MARY BERNADETTE DOYLE, and ALBERT JASON LIMA, Petitioners, vs. JAMES J. BOYLE, United States Marshal, Respondent.	MEMORANDUM OF LAW

STATEMENT

The petitioners were arrested on July 25, 1951 on Commissioner's warrants, charged with conspiracy to commit offenses against the United States prohibited by Section 2 of the Smith Act, 54 Stat. 671; 18 U.S.C. Sections 371, 2385. An indictment was returned against them on July 31, 1951. Since the day of their arrest, more than two months ago, these twelve men and women have been imprisoned, denied their freedom on reasonable bail.

There has never been any denial of the allegations in their petitions for release on reasonable bail as to their residence, family status, financial standing, reliability of attendance at legal proceedings, conditions of health and medical attention required. Tested by these undenied allegations, and by the factors prescribed in Rule 46 (c) of the Federal Rules of Criminal Procedure, as well as the provisions of the Constitution, these petitioners are entitled to their release on nominal bail pending the trial of the indictment returned against them. As District Judge Mathes stated in one of the proceedings before him: ".. I think $5,000 would assure the presence of any of these defendants insofar as their will to come is concerned" (transcript of

habeas corpus proceedings before Judge Mathes, August 15, 1951, p. 126).

Nevertheless, bail has been fixed for each of the petitioners in the sum of $50,000. Such an amount, on the record here, is clearly excessive and can have no other purpose than to deny petitioners their freedom on bail pending their trial under the indictment. Even the right to raise the claim that their constitutional rights have been infringed by the exaction of excessive bail has been denied by the Court of Appeals below.

The questions presented, therefore, in the proceedings before this Court raise serious constitutional questions of great public importance and affect directly the administration of justice in the federal courts over which this Court exercises a supervisory jurisdiction. In addition, a direct conflict exists between the decision of the Court below and the Court of Appeals for the Second Circuit on the issues involved.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted."

Federal Rules of Criminal Procedure, Rule 46, 18 U.S.C.A. provides in part as follows:

> "(a) Right to Bail.
>
> "(1) Before Conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense. * * *
>
> "(c) Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the

presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.****"

I

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN UNITED STATES EX REL RUBINSTEIN V. MULCAHY, 155 F.2d 1002(1946). THE WRIT OF HABEAS CORPUS HAS TRADITIONALLY ISSUED UPON A CLAIM THAT PERSONS WERE ILLEGALLY CONFINED ON EXCESSIVE BAIL.

The majority of the Court below have held in effect that one who is confined pending the trial of an indictment against him in the federal courts under excessive bail can have no resort to the writ of habeas corpus or any review of his claim that his constitutional rights have been infringed. His sole recourse is an appeal on constitutional grounds to the very court which fixed the bail in the first instance. The end result is a virtual suspension of the writ of habeas corpus (compare, Article I, Section 9, clause 2 of the Constitution) in all cases involving the claims of persons confined in jail under excessive bail. Such a ruling is contrary to the applicable decisions of this court, and does violence to the common law principles which define the use of the historic "writ of freedom" as authorized by the laws of the United States, 28 U.S.C. Section 2241.

As early as 1275, it was stated in the Statute of Westminster, (3 Edw. I, C. 15):

"And if any withhold Prisoners replevisable, after that they have offered sufficient Surety, he shall pay a grievous Americiament to the King; . . ."

Sir James Stephen, in his "History of the Criminal Law of England" (London, 1883, Vol. I, p. 234), states that "this statute was for 550 years the main foundation of the law of bail."

In 1679 the famous Habeas Corpus Act was enacted (31 Ch. II C. 2). Of this Act, Holdsworth states, in his "History of English Law", Vol. IX, pp. 118-119:

> "The success of the Act in effecting its object is illustrated by the desire of James II to get it repealed. His judges did their best to evade it by requiring prisoners, entitled to bail, to find security in such excessive sums of money that they were unable to furnish it. This abuse was the subject of one of the clauses of the Bill of Rights; and the law as thus settled by the Act and by the Bill of Rights was not altered for more than a century."

The clause of the Bill of Rights of 1689 to which Holdsworth refers is the source of the 8th Amendment to the Constitution of the United States. In re Kemmler, 136 U.S. 436, 446-447. It should also be noted that provisions similar to the provisions of the 8th Amendment to the Constitution are incorporated in the constitutions of 47 of the 48 states. Illinois is the only state which does not have such a provision in its constitution. In that state, however, excessive bail is forbidden, and may be reduced on habeas corpus. People ex rel Sammone v. Snow, 340 Ill. 464; 173 N.E. 8; 72 A.L.R. 798, 1930.

In McNally v. Hill, 293 U.S. 131, this court had occasion to define the term, habeas corpus, as it is used in the statutes authorizing the courts to issue the writ. In one of the footnotes contained in Justice Stone's opinion (written for a unanimous court), it was stated (page 137, footnote 1):

> "The Habeas Corpus Act appears from its preamble to have been especially, although not exclusively, directed at cases in which the King's subjects were detained in custody upon a criminal charge where by law they were entitled to bail. It authorized the writ to issue, directed to any sheriff or gaoler, or other person 'for any person in his or their custody.' It commanded

the production of the prisoner before the judicial officer to whom the writ was to be returned and directed that such officer 'shall discharge' the 'prisoner from his imprisonment' with provision for taking bail in his discretion, 'unless it shall appear' to him that the petitioner 'is detained upon a legal process, order or warrant out of some court that hath jurisdiction of criminal matters' or upon warrant for an offense 'for which by law the prisoner is not bailable.' 31 Car. II, Sec. II (2), Sec. III (6)(7)."

In ex parte Watkins, 3 Peters 193, this court, speaking again of the nature and uses of the writ of habeas corpus under the English Habeas Corpus Act, stated:

"English judges, being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which could not be sustained by evidence; and the writ when issued was sometimes disregarded or evaded, and great individual oppression was suffered in consequence of delays in bringing prisoners to trial. To remedy this evil the celebrated Habeas Corpus Act of the 31st of Charles II, was enacted, for the purpose of securing the benefits for which the writ was given."

In United States v. Hamilton, 3 Dallas 17, this Court admitted a prisoner to bail on a writ of habeas corpus after the prisoner had been confined upon the warrant of a district judge in the state of Pennsylvania, charging the prisoner with the crime of treason.

In the light of the foregoing, the Court of Appeals below misconceived the nature and historic function of the writ of habeas corpus. The sole issue before the court below on habeas corpus was whether the bail fixed in criminal proceedings was excessive. If the bail was excessive, then the constitutional rights of the petitioners were violated, and the court was required to grant appropriate relief. The appropriate relief required under the law was for the court to

fix reasonable bail in the light of the undenied allegations contained in the petitions for writs of habeas corpus. Wholly apart from the rulings of the court in the criminal proceedings, the court on habeas corpus was required to examine into the question of whether or not the petitioners were illegally restrained in violation of their constitutional rights. Whenever a claim that fundamental rights guaranteed by the Constitution have been infringed has been urged before this court, this court has always held that the writ of habeas corpus is the appropriate means for testing the claim. Ex parte Royall, 117 U.S. 241; Frank v. Mangum, 237 U.S. 309; Mooney v. Holohan 294 U.S. 103; Von Moltke v. Gillies, 332 U.S. 708; Hawk v. Olson, 326 U.S. 271; see also, McNab v. United States, 318 U.S. 332.

The decision of the Court of Appeals for the Second Circuit, in United States ex rel Rubinstein v. Mulcahy, 155 Fed. 2d 1002(1946) would appear to be supported by the decisions of this court and the historic precedents which run back into the history of the Common Law in England. The decision of the court below, on the contrary, cites no support in authority, and effectively thwarts the use of the writ of habeas corpus in a type of case which historically gave birth to this famous writ.

(1930); Cooley, Constitutional Limitations (7th ed.), p. 439; Black, Constitutional Law (3rd ed.) p. 704.

In Peo. ex rel Sammone v. Snow, supra, a leading decision, the Court stated:

> "The amount of $50,000 could have no other purpose than to make it impossible for him to give the bail and to detain him in custody and is unreasonable. The constitutional right to be admitted to reasonable bail cannot be disregarded. The judge has no more right to disregard and violate the constitution than the criminal has to violate the law. It is the duty of courts to support and maintain the Constitution, and if the judges, who have taken an oath to support the Constitution openly violate it, how can they expect the courts to retain the confidence and respect of the people? A criminal may have forfeited his right to liberty, but neither courts nor any other power have the right to deprive him of it except in accordance with the law of the land."

In the light of the foregoing, it appears clear that if, as the record establishes, the amounts of bail required of petitioners are excessive, then they have been deprived of their liberty without due process of law and in violation of the express provisions of the Constitution which guarantees them their right to freedom on bail pending the trial of any indictment returned against them.

III

THE PETITIONERS WERE ENTITLED TO THEIR RELEASE ON BAIL IN REASONABLE AMOUNTS PURSUANT TO THE CRITERIA SET FORTH IN RULE 46(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The provisions of Rule 46(c) of the Federal Rules of Criminal Procedure, considered in the light of the constitutional mandate, prescribe the sole factors which a court may consider in fixing bail. The factors prescribed in the Rule are the only factors which the Court may weigh and compare for the purpose of determining what amount will be sufficient -- and no more than sufficient -- to insure the presence of the accused. The amount which "will insure the presence of the defendant" is the sole object of the Rule. In determining that amount, the Court may consider (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against defendant; (3) the financial ability of the defendant to give bail; and (4) the character of the defendant. We consider these factors here seriatim.

1. The nature and circumstances of the offense charged.

So far as the nature and circumstances of the offense charged is concerned, the only source of information is the indictment itself. The petitioners are charged with conspiring to advocate and to organize a society which advocates the forcible overthrow of government. The substantive offenses are set forth in 18 U.S.C. Section 2385. The petitioners are not charged with the commission of the substantive offenses. The offense charged in an unlawful agreement to advocate in the future the proscribed doctrines. The offense is punishable under 18 U.S.C. Section 371, the general conspiracy statute. No non-verbal or physical acts are part of the offense charged in the indictment.

The Smith Act was enacted in 1940. It was the only peacetime sedition act ever enacted in the United States since the Alien and Sedition Acts of 1798. Its validity and wisdom was always in

doubt. See Chafee, Z., Freedom of Speech in the United States (N.Y. 1941). The constitutionality of the statute was not decided until June 4, 1951 by this Court in Dennis v. United States, 341 U.S. 494, 95 L. ed. Adv. 864.

It was conceded in the opinion of this Court that the application of the Statute would always be of serious concern to the Court since the law obviously impinged on freedom of speech, press and assembly protected by the Constitution. Thus, it was stated (P. 879):

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution."

The decision of this Court leaves open, therefore, many important legal and constitutional questions. It has been the subject of many critical comments by the public press and civic and professional organizations. There is every reason for the petitioners to appear and vigorously prosecute their defense against the charges contained in this indictment.

So far as the seriousness of the offense is concerned, it is clear that Congress has not fixed the punishment with unusual severity. The maximum punishment which can be imposed is five years imprisonment and $10,000 fine. 18 U.S.C. Section 371.

Moreover, Congress has spoken directly on the subject of the gravity of the offense. The legislative history is significant. When Congress enacted the new Criminal Code in 1948 it eliminated any reference to the conspiracy provisions of the Smith Act. The Reviser's Notes under Section 2385 states:

> "Reference to conspiracy to commit any of the prohibited acts was omitted as covered by the general conspiracy provision, incorporated in Section 371 of this title."

It should be noted, however, that a number of other sections in the new Criminal Code retained their conspiracy provisions. The explanation for this different action by Congress is explained in

the Reviser's Notes under Section 371:

"A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense" (emphasis added)

Thus, Congress has decided that a maximum penalty of five years and $10,000 fine is commensurate with the gravity of the offense charged herein. It is respectfully submitted that this specific determination cannot be disregarded by the Court. For individual judges to characterize an offense as more serious and deserving of greater punishment than the legislature has ordained is to intrude the judiciary into the legislative field. There is, therefore, nothing in the "nature and circumstances" of the case herein which called for the unusual amounts of bail required of the petitioners herein.

Moreover, of all the cases now pending in the United States District Court for the Southern District of California, Central Division, where bail has been fixed, the cases herein represent by far the highest bail set in that District. In 153 cases pending in the Southern District where the penalty was five years and more (and where more than one count was involved in many indictments), the average bail fixed was less than $3,000 (See Exhibits "A" and "B" annexed to the petitions for writs of habeas corpus in the Transcripts). In only twelve cases was bail fixed at sums in excess of $10,000 and in only two cases was bail fixed in the sum of $25,000. In one of the latter cases involving mail fraud and conspiracy, the indictment was in five counts with the possible penalty of 25 years imprisonment and $50,000 fine. In the other case involving an indictment of an alien for violation of a provision of the McCarran Act, the penalty fixed by the statute was ten years, and in that case bail, originally set at

II

THE PETITIONERS WERE ENTITLED TO THEIR FREEDOM ON REASONABLE BAIL PENDING TRIAL OF THE CHARGES CONTAINED IN THE INDICTMENT UNDER THE EXPRESS PROVISIONS OF AMENDMENTS V, VI, AND VIII TO THE UNITED STATES CONSTITUTION.

It is well established that bail in criminal cases is intended to combine the administration of justice with the liberty and convenience of the persons accused. The purpose of the allowance of bail is to prevent the punishment of innocent persons as well as to secure the presence of the persons charged with crime at their trial. Bail is never required by way of punishment. The policy of the law is generally to encourage the granting of bail and even after conviction and pending appeal, bail is customarily granted whenever any substantial question of law is presented.

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has finally been adjudged guilty in the Court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction pending a writ of error."
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> Hudson v. Parker, 156 U.S. 277, 285, 39 L. ed. 424, 427.

The Judiciary Act of 1789, section 33, specifically provided that upon all arrests in criminal cases, bail should be admitted except where the punishment may be death in which case it could be granted in the discretion of the Court. A similar provision was embodied in the Revised Statutes of 1875, section 1015. The Revised Statutes later became sections 596 and 597 of old title 18 of the United States code and then finally was embodied in Rule 46 of the new Federal Rules of Criminal Procedure, 18 U.S.C.

In interpreting the constitutional and statutory provisions of law pertinent to bail, Mr. Justice Butler of the Supreme Court of

the United States sitting as Circuit Court Justice in the Circuit Court of Appeals for the Seventh Circuit in United States v. Motlow, 10 F. 2d, 657 (C.C.A. 7, 1926) stated (p. 662):

"It will be observed that the character of the crime charged or probable guilt or innocence is not suggested as having any bearing. The statement shows that trial and conviction according to law should precede punishment. It reflects the purpose of the Federal statutes and the rules of court above stated, that no one should be required to suffer imprisonment for crime before the determination of his case in the court of last resort". See also McKnight v. United States, 113 F. 451 (C.C.A. 6, 1902); Jones v. United States, 12 F. 2d, 708 (C.C.A. 4, 1926)."

Bail therefore, in the Federal Courts in non-capital cases is a matter of right before conviction. Its purpose before trial is to insure the presence of the accused when required without the hardship of incarceration before guilt has been proved and while the presumption of innocence is to be given effect." United States ex rel Rubinstein v. Mulcahy, 155 F. 2d 1002, 1004 (C.C.A. 2 Circ. 1946). Bail is an important right essential to the preservation of liberty. From the viewpoint of due process of law, it guarantees to each accused, in the light of the constitutional provisions, that he shall have adequate opportunity to prepare his defense with the assistance of counsel.

Bail which is excessive in the light of the constitutional mandate and the appropriate statutory provisions is in effect a denial of bail in its entirety. Excessive bail can have no other purpose than to make it impossible for the accused to give bail and to detain him in custody. United States v. Lawrence, Fed. Cases No. 15,577 (C.C.D.C. 1835); United States v. Brawner, 7 Fed. 86 (D.C.W.D. Tenn. 1881); Adkins v. Regan, 313 Ky. 695, 233 S.W. (2) 402 (1950); Peo. ex rel Sarrone v. Snow, 340 Ill. 464, 173 N.E. 8

$25,000, was subsequently fixed at $15,000 under a superseding indictment.

Exhibit "A" annexed to the petitions in the Transcripts demonstrates also that no Court in any part of the country has fixed bail in any Smith Act prosecution subsequent to the Dennis decision in such grossly excessive amounts as has been fixed herein. Despite the pattern of requests by the Government for the fixing of bail at such sums as $100,000, $75,000 and $50,000, the records demonstrate that the bail set by the Courts has varied from sums generally fixed at $5,000 and $10,000 and, in some cases, at $20,000. It should be noted again, in this connection, that Judge Mathes stated in the proceedings before him "that $5,000 would assure the presence of any of these defendants insofar as their will to come is concerned" (Transcript of proceedings on habeas corpus, p. 126).

Moreover, even if a Court, in plain disregard of the legislative determination, should characterize an offense as most heinous in its own estimation, still this would not authorize the denial of bail or the fixing of excessive bail. In United States v. Motlow, 10 F. 2d 657 (C.C.A. 7, 1926), Mr. Justice Butler, of the Supreme Court, sitting as Circuit Justice in the Circuit Court of Appeals, stated:

> "The Eighth Amendment provides that 'excessive bail shall not be required'. This implies and therefore safeguards the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail... Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor" (pp. 659, 662).

2. The weight of the evidence.

The record is barren of any evidence against the petition-

ers. Probably this factor is significant only in capital cases. Compare, Rule 46(a)(1) of the Federal Rules of Criminal Procedure. Only the indictment appears in the record herein, and an indictment is never evidence.

> "An indictment charges the defendant with action or failure to act contrary to the law's command. It does not constitute proof of the commission of the offense."
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> Tot v. United States, 319 U.S. 463, 466, 87 L. ed. 1519, 1523

It was suggested by Judge Mathes during the arguments before him that the evidence before the grand jury which recommended bail of $75,000 and $100,000 might be considered as a factor in determining the weight of evidence. There is no authority in law for a grand jury to recommend bail. Bail is required to be set by the Court upon evidence adduced before it. The evidence, if any, presented to the grand jury by the prosecutor was legally unknown to the District Court. That evidence was untested by cross-examination or contrary proof. Its competency, relevancy or materiality was not passed upon. If the view of the District Court were sustained, the question of bail in every case would pass from the hands of the Courts into the hands of prosecutors and grand juries.

3. The financial ability to give bail.

The financial ability of the petitioners to pay anything but nominal bail is undisputed. Although the average income of all the petitioners is only about $50 per week and their other assets almost nil, bail has been set in the sum of $600,000. When it is considered that the average bail in the Southern District of California is less than $3,000, it cannot be denied that an increase over such average of 1600% without reason is grossly excessive. While bail need not necessarily be fixed at the precise amount an defendant can afford to furnish, it can hardly be denied that to fix bail in amounts which are entirely prohibitory is to simply disregard the defendant's financial ability, and lends support to the view that bail has been fixed

solely for the purpose of detention.

A number of decisions make this perfectly plain. One of the most recent is United States ex. rel. Rubinstein v. Mulcahy, 153 F. 2d 1002 (C.C.A., 2 Circ., 1946). The defendant, charged with conspiracy to evade the draft, was a resident of New York but a naturalized citizen of Portugal, a country from which he could not have been extradited had he fled there. His bail was originally set at $20,000 but the government, on a showing that he had made trips out of the jurisdiction without notice to the District Attorney's office, that he had converted some of his assets into cash, and that he had transferred some of his assets out of the country, applied to have it raised to $1,000,000. The District Court cut the government's figure in half and reset bail at $500,000. Apparently the defendant was very wealthy, for it was "not claimed that he cannot furnish bail in the amount of $500,000, but only that it will require financial arrangements unreasonably burdensome." (p. 1004) On habeas corpus, the Circuit Court of Appeals held the figure excessive.

The Rubinstein case expresses in a very condensed form the governing principles to be borne in mind: (1) that the reason for bail is "the need for a tie to the jurisdiction"; (2) that in considering the strength of the tie to be created by bail, the manifold ties to the jurisdiction which the defendant already has are to be borne in mind: his home, his family, his health, his relatives, etc.; (3) that "the past record and recent action of the accused" are to be considered, but are to be considered only "as bearing upon his good faith in appearing for trial"; (4) that the need for a tie to the jurisdiction is not to be considered as the sole question involved, nor even as the primary and over-riding consideration, but is to be fairly balanced against the equally important "right to freedom from unnecessary restraint before conviction"; (5) that there is no presumption that the defendant intends to flee, nor can any such intention be inferred merely from the ability to do so.

In United States v. Lawrence, Fed. Cas. No. 15,577, (CC,

D.C., 1835), the defendant had attempted to assassinate the President of the United States (Andrew Jackson). His attempt failed only because his gun failed to fire.

> "After inquiring as to his property and circumstances, the chief Judge said to Mr. Key, the district attorney, that he supposed bail in $1,000 would be sufficient, as it was not a penitentiary offense, there being no actual battery, and as he did not appear to have any property. Mr. Key seemed, at first, to acquiesce, but having conversed with some of the president's friends who stood around him, he suggested the idea that it was not impossible that others might be concerned who might be disposed to bail him, and let him escape to make another attempt on the life of the president, and therefore thought that a larger sum should be named. The chief judge then said that there was no evidence before him to induce a suspicion that any person was concerned in the act; that the Constitution forbade him to require excessive bail and that to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law." (p. 888)

In United States v. Brawner, 7 F. 86 (D.C., W.D. Tenn., 1881), bail had been set at $5,000 for a defendant charged with counterfeiting. The defendant was poor and unable to meet this amount. Citing and following the rule of the Lawrence case that "to require larger bail than the prisoner could give would be to require excessive bail," the court held this amount to be excessive and in violation of the Eighth Amendment.

See also, Barrett v. United States, 4 F. 2d, 317, 319 (C.C.A. 6, 1925); Flores and Eades v. United States, (C.C.A. 7, March 17, 1930, unreported), quoted in 5 Notre Dame Law 419 (April-May, 1930).

4. The character of the petitioners.

As to this aspect of the case, the allegations set forth

in the petitions for writs of habeas corpus remain undenied. The petitioners have lived in most of the cases all of their mature lives in California. They have families, wives, husbands, children and relatives. Some have held public office; others have been candidates for office and polled large electoral votes. A number of the petitioners are honorably discharged veterans of World War I and II. Six of them have never been arrested for any offense. The others were in almost all cases ultimately exonerated of the offenses for which they were convicted. In all these cases, they were released on nominal bail or on their own recognizance, and always attended all required proceedings with final exoneration of bail. Knowledge that arrests were pending in the case herein only found the petitioners ready and determined to meet the charges against them.

IV

RULE 46(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AS CONSTRUED AND APPLIED BY THE COURT BELOW IS UNCONSTITUTIONAL AND DEPRIVES THE PETITIONERS OF THEIR LIBERTIES AS GUARANTEED BY THE FIRST, FIFTH, SIXTH AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CONSTITUTES A BILL OF ATTAINDER IN VIOLATION OF ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION.

The reasoning of the Court below largely based on the views of District Judge Mathes, appears to reflect the opinion that the amounts of bail required of these petitioners was necessary in order to detain the petitioners, not to insure their presence or to grant them their liberty pending the trial of the charges made against them. Judge Mathes, for example, stated (tr. in habeas corpus proceedings, p.104):

> "As I understand the rule, Mr. Marshall, in fixing bail the court always has in mind the presumption of innocence, but considers as one of the factors that the defendants may be guilty of the charge."

The rule is explicitly to the contrary. Thus, in United States v. Motlow, 10 F. 2d 657 (C.C.A. 7, 1926), Justice Butler stressed "that the character of the crime charged or probable guilt or innocence is not suggested as having any bearing."

In D'Aquino v. United States, 180 F.2d 271 (C.C.A.9, 1950), Justice Douglas, sitting as Circuit Justice, stated (p. 272):

> "The question of the guilt or innocence of an appellant is not an issue on an application for bail."

The opinion of the Court below adopts the position of the District Court that the petitioners must be assumed (along with all other persons charged with being members or leaders of the Communist Party) to be hostages held in protective custody because other persons in another jurisdiction failed to comply with the obligations of their

bail. To use the bail process for such end results is to pervert a constitutional right into a weapon of oppression.

If the matter rested upon analogy alone, it should be noted that in the Dennis case, seven of the defendants did appear and surrender. Further, in the Dennis case bail was fixed at $5,000 after indictment and until conviction; thereafter the sum was increased to $20,000. The petitioners here have only recently been indicted; they are presumptively innocent of the charges made against them, and it is undisputed that they are prepared to appear and vigorously defend themselves.

But the matter does not rest upon analogy alone. The Court below was in effect saying that the petitioners here and the four persons in New York were in effect all members of one conspiracy and that the object of the conspiracy was to abscond. There is not a single bit of evidence in the record to support such an unwarranted holding. The only matter in the record is an indictment, and an indictment as we have heretofore noted, proves nothing. Can a conspiracy to abscond be implied? This Court has pointedly answered that question in the negative. Krulewitch v. United States, 336 U.S. 440. Justice Jackson in his concurring opinion sharply emphasized the vice of "implied conspiracies" (p. 436):

> "It is difficult to see any logical limit to the 'implied conspiracy', either as to duration or means, nor does it appear that one could overcome the implication by express and credible evidence that no such understanding existed, nor any way in which an accused against whom the presumption is once raised can terminate the imputed agency of his associates to incriminate him. Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations

out of court. On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, or even putting an incorrigible witness with damaging information out of the way."

District Judge Mathes made reference to the rule that bail is generally denied on capital cases because experience has shown that persons facing death have a temptation to run away. But this generalized experience of mankind founded on a law of nature is hardly a reason for concluding that persons charged with being members of the Communist Party are to be imprisoned because of an occurrence which took place in another jurisdiction 3,000 miles away. As a matter of fact, in a second Smith Act prosecution in the Southern District of New York, Judge Sylvester Ryan, a Judge of that court, on a motion to increase bail (See Exhibit A annexed to petitions in Transcripts) stated:

"I cannot in justice to these defendants charge them with the non-appearance of four other defendants . . . This Court cannot charge these defendants with being confederates or in any way having conspired or being in alliance with those not here" (Tr. in bail proceedings, p. 83).

The cogency of Judge Ryan's observations are exemplified by the injury which has been done to the petitioners here. The principle argument of the government below, both in the District Court and in the Court of Appeals, was that bail in the sum of $50,000 should be imposed because four persons had failed to appear in the Southern District of New York, after their judgments of conviction were affirmed by this Court. The government argued that the four persons, named in this indictment as co-conspirators, but not defendants, had been the subject of an "unsuccessful national survey by the Federal Bureau of Investigation, that it was "reasonable to believe" that a

"national conspiracy" exists, that somewhere there are "persons presently unindicted who would readily harbor fugitives", willing to provide "concealment of defendants" who are "unlike the usual fleeing criminal who must pay dearly for his hide-outs." It was largely upon this argument that the courts below found that this exceedingly high bail of $50,000 was not excessive.

The record, however, is absolutely devoid of any evidence of any connection between the petitioners here and the defendants in the Southern District of New York. There was not an iota of evidence to indicate in any way that the petitioners would not honor the obligations of their bond. Further, the petitioners here, on the record, are 12 men and women presumptively innocent of any charges contained in the indictment which has just recently been returned against them. Yet the government was permitted to build up a conjectural conspiracy which the petitioners could not possibly combat. The petitioners swore as to their financial abilities and their characters and willingness to defend and demonstrated the strong ties which they had to the jurisdiction. Nothing that they alleged was denied. Yet, if the viewpoint of the court below is sustained, petitioners are to be confined prior to trial on grossly excessive bail because law enforcement agencies have not apprehended four persons who forfeited their bail in New York after affirmance of their conviction, and because some "national conspiracy" to harbor and conceal petitioners has been inferred by prosecuting officials.

If the amount of bail for a defendant in a criminal case is to be determined by such factors, then the constitutional right to bail and Rule 46(c) are wastepaper, and the judiciary, so far as bail is concerned, will become merely an arm of the Executive Department, dependent upon the whims and vagaries of prosecuting officials.

If the government's views are correct, and if the sole factor before any court, regardless of what appears in the record, is the question of the four persons who failed to appear in New York, then

the government has the burden, it is respectfully submitted, to explain why the district courts of New York (Ryan, J.), Philadelphia (Kirkpatrick, J.), Baltimore (Chesnut, J.), and Hawaii (Metzger, J.), in subsequent Smith Act prosecutions, fixed bail in sums of $5,000 and $10,000, and in some cases, at $20,000. The government in all these cases argued for bail in $100,000 and $75,000, and the same arguments of an implied conspiracy to forfeit bail were advanced. Nevertheless, bail was fixed by the various district courts at far lower figures. The government, it is respectfully submitted, can make no explanation other than the fact that some judges of the courts of the United States refused to abandon their constitutional functions and applied the law of the land dispassionately.

It is fundamental in American law that guilt is individual. It is abhorrent to the rudiments of our justice to judge a man or attaint him because of his family, his creed, or his associations only. That basic principle in American law, fundamental to the democratic process, has been emphasized on many occasions. Bridges v. United States, 184 F.2d 881 (C.C.A.9,1950); Williamson v. United States, 95 L. ed. Adv. 10; Schneiderman v. United States, 320 U.S. 118; Bridges v. Wixon, 326 U.S. 135; DeJonge v. Oregon, 299 U.S. 353; Herndon v. Lowry, 301 U.S. 242; Baumgartner v. United States, 322 U.S. 665. When it is considered that a primary purpose of the historic Habeas Corpus Act was to insure that habeas corpus would reach to and liberate persons held in jail upon "suspicions which could not be sustained by evidence" (Ex Parte Watkins, 3 Peters 193, 202), it appears clear that the substitution of guilt by association for proof of personal wrongdoing converts the "Writ of Freedom" into ordinary process.

Furthor , it was stated by the District Court that it could not overlook what the Congress of the United States has said about "the Communist conspiracy" (tr. in bail proceedings, p. 26). This was undoubtedly a reference to the findings contained in Section 2 of the

Internal Security Act of 1950, commonly known as the McCarran Act.

But the District Court below was not involved in the trial of a McCarran Act violation, nor was it passing upon the constitutionality of that measure. Nor was the Court passing upon the exercise of discretion by another arm of government as in Carlson v. Landon, 187 F. 2d 991 (C.C.A.9, 1950). The petitions for writs of habeas corpus herein were directed to the judiciary who were required to exercise a legal discretion upon "facts" and "evidence" adduced in Court in order to render justice, 28 U.S.C. Section 2243. A "hearing" was required upon evidence; not reliance upon "legislative findings" in another statute whose only purpose, if any, is to cast light upon the legal meaning of that statute.

The "law of the land" requires in absolute minimum "a law which hears before it condemns." Powell v. Alabama, 287 U.S. 45, 68. Indeed, that the Constitution commands at least this much "needs nothing but statement." Riberside and Dan River Cotton Mills, Inc. v. Menefee, 237 U.S. 189, 193. As stated in Powell v. Alabama, supra, at p. 68, "It never has been doubted by this Court, or any other so far as we know", that "hearing" is a prerequisite to due process. It is so because it is required by the "inimitable principles of justice which inhere in the very idea of free government and which no member of this union may destroy." Holden v. Hardy, 169 U.S. 366, 369.

But of what avail is a "hearing" if guilt has been predetermined? If, in a proceeding in habeas corpus, the petitioners are deemed conspirators before they have been tried, if judicial notice may be taken of their guilt without any proof produced, and merely on the basis of the "findings" another arm of government, of what avail is habeas corpus or the due process clause of the Fifth Amendment to the United States Constitution?

If Rule 46(c) of the Federal Rules of Criminal Procedure relative to the amounts of bail were to be read as the Court below would read it, the enactment would become an attainder and a nullity in law.

McFarland v. American Sugar Refining Co., 241 U.S. 79, 86-87. "Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." Manley v. Georgia, 279 U.S. 1, 6. See also, Morrison v. California, 291 U.S. 82; Western and Atlantic Railway Co. v. Henderson, 279 U.S. 639; Tot v. United States, 319 U.S. 463.

Legislatures enact laws, courts and courts alone try the alleged violators. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226; Opp Cotton Mills v. Adminstrator, 312 U.S. 126, 145. It mistakes the respective functions of the two branches of government to assume that a matter "found" by one may properly be given consequences within the processes and for the purposes of the other. The character of the hearing which precedes a finding "must be adapted to the consequences that are to follow." Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 319.

It was not within the power of Congress to imprison these petitioners by legislative edict; yet the Court below has done that very thing upon the basis of a legislative "edict." In so doing, it has overlooked the fact that it is not within the competence of the judiciary to find persons guilty of wrongdoing upon the basis of "legislative findings." It overlooked the fact that the plain duty of the judiciary pursuant to constitutional mandate is to find its own "facts" upon proof fairly established by the prosecution.

CONCLUSION

There has been very little attempt by the Government in this case to disguise the purpose of its request for excessive bail. The pattern which is unfolding throughout the country evidences a deliberate attempt by the executive arm of government to arrest and imprison alleged members of the Communist Party and keep them in jail until they are tried and convicted. The petitioners here are admittedly poor persons and they are in no position to raise $50,000 as bail. This cannot be denied by the Government. A fair

trial is impossible under such circumstance. It is respectfully submitted that unless the federal courts afford the rudiments of due process to defendants accused of crime, the American premise of equal treatment before the law will have been completely undermined and the protection of all Americans in their fundamental liberties will be seriously endangered.

Margolis and McTernan,

By Ben Margolis

Counsel for Petitioners

Ben Margolis

and

Daniel G. Marshall,

Counsel for Petitioner Connally

Sam Rosenwein,

Of Counsel